BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LARRY CABLE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,027,595
CENTURY CONCRETE, INC.	)	
Self-Insured Respondent	)	

ORDER

Claimant appeals the September 21, 2009, Award of Administrative Law Judge Kenneth J. Hursh (ALJ). Claimant was awarded benefits for a 32.5 percent whole person impairment for injuries suffered on February 9, 2006, while working for respondent.

Claimant appeared by his attorney, Mark E. Kolich of Lenexa, Kansas. Respondent appeared by its attorney, Frederick J. Greenbaum of Kansas City, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on December 8, 2009.

ISSUES

1. What is the nature and extent of claimant's injuries and disability from the accident on February 9, 2006? The parties have stipulated that if claimant's impairment and disability stem solely from the February accident, the impairment is limited to a 32.5 percent whole body disability.

2. Did claimant suffer an injury on August 2, 2007, which is a natural and probable consequence of claimant's original injury on February 9, 2006, or does this constitute a new and separate non-work-related injury?

3. Is claimant entitled to medical treatment at the expense of respondent for the injury which occurred at home on August 2, 2007? The parties have stipulated to all aspects of this matter with the exception of whether the August 2, 2007, accident is a natural and probable consequence of the original injury on February 9, 2006.

As was stipulated to the Board at oral argument, if the August 2, 2007, accident and resulting injuries are the natural and probable consequence of the earlier 2006 accident, then claimant shall be awarded a 37.5 percent whole body disability pursuant to the agreement of the parties and the medical expenses stemming from that accident will be the responsibility of respondent. If there is no connection between the injury claimed on August 2, 2007, and claimant's work injury on February 9, 2006, then the impairment remains at the 32.5 percent whole body level awarded by the ALJ, and the medical expenses from the 2007 accident will remain the responsibility of claimant.

FINDINGS OF FACT

Claimant had been employed for several years as a truck driver for respondent when, on February 9, 2006, he was involved in a serious rollover accident. Claimant sustained multiple injuries that included a crushed left leg, broken ribs, cracked vertebrae in his lower spine, burns on his face and back, bleeding in his brain and a crushed muscle in his upper left arm. Claimant underwent surgery on his low back to remove a seroma and also had surgery on his neck, left leg and left shoulder. He was released to light duty in August 2006 and returned to driving a truck in February 2007. Claimant was still having low back problems and described a dull, aching pain in his low back when he had to sit for any length of time.

Claimant's duties required that he climb up and down the ladder on the back of the truck to check his loads. He also had to lift three chutes from the back of the truck which weighed 50 to 60 pounds each to wash them. The chutes were then returned to the back of the truck. The return to regular duty caused claimant's low back pain to slowly worsen. He would have a dull ache in his low back when sitting and would get a lot of pain when he would get up. Claimant testified that he suffered no work-related accidents after this return to work, only the slow worsening of the back pain.

On August 2, 2007, claimant got out of bed at home and experienced a severe pain in his low back. The pain was so bad that claimant collapsed to the floor. He was taken to the emergency room at St. Luke's Northland Hospital (St. Luke's) and was admitted. Later, claimant was transferred to North Kansas City Hospital as he needed to see a neurosurgeon and St. Luke's did not have one. Claimant was hospitalized for a total of five days. Claimant was initially denied medical treatment by respondent. He then went to his family doctor, Ellis Berkowitz, M.D., for treatment. Claimant then sought treatment with orthopedic surgeon R. Chris Glattes, M.D., at Kansas University Physicians, Inc. Dr. Glattes diagnosed claimant with degenerative disc disease at L4-5 and L5-S1. Claimant also had a small herniated disk at L4-5 with a small disc fragment affecting the right L5 root. Claimant was recommended for and underwent epidural steroid injections at L4-5 and L5-S1. Claimant experienced only temporary relief from the injections. A second series of injections provided no greater benefit. Dr. Glattes then

referred claimant to neurosurgeon Christopher C. Meredith, M.D., of Kansas University Neurological Surgery Association.

Dr. Meredith diagnosed claimant with neuroforaminal stenosis on the right at L4-5 and L5-S1 with radiculopathy on the right side. After additional injections failed to provide relief, claimant underwent surgery under the hand of Dr. Meredith on April 8, 2008, consisting of a partial discectomy, foraminotomy and partial ventral facetectomy at L4-5 and L5-S1. By May 12, 2008, claimant had reached maximum medical improvement (MMI) and was released to return to work without restrictions. However, Dr. Meredith did caution that claimant be careful as the pain could return any time within the next two to ten years. Claimant was referred to pain management to see if something could be done about his ongoing coccyx discomfort.

Claimant was referred by his attorney to board certified emergency medicine and occupational medicine specialist P. Brent Koprivica, M.D., for an evaluation on April 18, 2007, and again on May 23, 2009. Dr. Koprivica reviewed claimant's prior medical records and took a history from claimant. He noted the seroma which was surgically removed from claimant's back after the injury in 2006. He noted claimant's reduced tolerance for sitting, ongoing low back pain and the need to get out of his truck every 20 minutes because of the pain generated from prolonged sitting.

The second examination in 2009 was exclusively an examination of the low back. Dr. Koprivica was provided information regarding the various treatments and the surgery claimant underwent to his low back. It was noted that claimant went to the emergency room on several occasions in May of 2007 due to low back pain. Initially it was suspected that claimant might be suffering from kidney stones. However, that suspicion was short-lived and by May 21, 2007, claimant had undergone another MRI of the lumbar spine. When asked to compare the MRI of 2007 with the one from the accident in 2006, Dr. Koprivica determined that there was no material difference between the MRIs. Dr. Koprivica did note that claimant experienced right leg radiculopathy and pain for the first time after the 2007 incident. However, he determined that the 2007 incident was a natural consequence of the 2006 injury. He explained the new right leg symptoms by noting that the annulus, once torn, begins the degenerative process. At some point, the annulus then becomes symptomatic. However, it is nearly impossible to determine when the symptoms will display. The initial injury to the disk occurred in 2006. The progression of the deterioration of the disk was going to happen.

Claimant was referred by respondent to board certified physical medicine and rehabilitation specialist Eden Wheeler, M.D., for an evaluation on June 5, 2008. Dr. Wheeler also had the opportunity to review claimant's past medical records and was provided a history similar to that given Dr. Koprivica. However, Dr. Wheeler determined that the incident of August 2, 2007, was a new and separate accident with no connection to the 2006 injury. Claimant's comments to Dr. Templeton after the original 2006 accident were to the effect that his back pain had resolved after the drainage of the seroma and

claimant had returned to work without restrictions. Dr. Wheeler determined that the emergency room visits in May 2007 were for kidney stones and not the lumbar spine. She opined that the problems leading to the 2008 surgery were the result of preexisting degenerative changes in claimant's back. Dr. Wheeler's notes did reflect that claimant was having ongoing symptoms in his low back even after the seroma surgery. It was Dr. Wheeler's opinion that the surgical procedure and all the treatment relating from the August 2, 2007, incident were not related to the February 9, 2006, accident.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[1]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[2]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[3]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[4]

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[1] K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

[2] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[3] K.S.A. 2005 Supp. 44-501(a).

[4] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

There is no dispute that claimant suffered a serious injury as the result of the February 9, 2006, accident. Claimant underwent multiple surgeries from and as the result of that accident. While claimant returned to his regular job driving a truck for respondent, this record does not support a finding that claimant fully healed from that accident. Claimant testified to ongoing problems in his low back when required to sit for long periods of time. Additionally, claimant was experiencing symptoms to his low back for a significant time leading up to the August 2, 2007, incident. While the May 2007 emergency room records do indicate the possibility of kidney stones being the problem, the record fails to identify that claimant was ever actually diagnosed with kidney stones at that time. Additionally, at the May 21, 2007, visit, claimant underwent a second MRI, not a normal treatment regime for kidney stones.

In general, the question of whether the worsening of a claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether the claimant's subsequent work activity aggravated, accelerated or intensified the underlying disease or affliction.[5]

In workers' compensation litigation, when a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.[6]

However, the Kansas Supreme Court, in *Stockman,*[7] stated:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, the claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

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[5] *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998).

[6] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

[7] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 505 P. 2d 697 (1973); *see also Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

In *Gillig,*[8] the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber*,[9] the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."

> Whether an injury is a natural and probable result of previous injuries is generally a fact question.[10]

> When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.[11]

This record supports a finding that claimant's low back never properly healed from the February 9, 2006, injury. Claimant testified to ongoing back pain and limitations. Driving and long periods of sitting caused him significant discomfort. The Board finds that the August 2, 2007, accident and resulting injury to claimant's low back was a natural and probable consequence of the 2006 work-related accident. The denial of benefits by the ALJ is reversed. Pursuant to the stipulations of the parties, claimant's permanent partial disability is increased to 37.5 percent to the whole body. Additionally, respondent is responsible for the medical treatment necessitated by that accident.

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[8] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[9] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

[10] *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, Syl. ¶ 1, 128 P.3d 430 (2006).

[11] *Id.* at Syl. ¶ 3.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be reversed as claimant has proven that the incident on August 2, 2007, is a natural and probable consequence of the accident occurring on February 9, 2006. Accordingly, respondent is found liable for the medical treatment necessitated by that accident. In addition, claimant's whole body permanent partial disability is increased to 37.5 percent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Kenneth J. Hursh dated September 21, 2009, should be, and is hereby, reversed as the accident occurring on August 2, 2007, is found to be a natural and probable consequence of the accident of February 9, 2006.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Larry Cable, and against the respondent, Century Concrete, Inc., a qualified self insured, for an accidental injury which occurred on February 9, 2006, and based upon an average weekly wage which is sufficient for the maximum weekly benefit on the date of accident.

Claimant is entitled to 48.71 weeks of temporary total disability compensation at the rate of $467.00 per week totaling $22,747.57, followed by 142.98 weeks at the rate of $467.00 per week totaling $66,771.66 for a 37.5 percent permanent partial disability, making a total award of $89,519.23, all of which is due and owing and ordered paid in one lump sum, minus any amounts previously paid.

The record does not contain a filed fee agreement between claimant and claimant's attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant for approval.[12]

IT IS SO ORDERED.

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[12] K.S.A. 44-536(b).

Dated this ____ day of December, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant
Frederick J. Greenbaum, Attorney for Respondent
Kenneth J. Hursh, Administrative Law Judge